Y.B. DATO' HO PHOOI KEOW

v.

TAN YOKE LAN

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. C 8289 OF 1985]
21 NOVEMBER 1986

CIVIL PROCEDURE: *Appeal against decision of Senior Assistant Registrar ordering that final judgment be entered against defendant - Moneylenders Ordinance 1951 - Section 3 - Allegation by defendant that the interest of 14% per annum charged by plaintiff unconscionable and illegal - Whether the loan agreement unenforceable - Issues - Whether they should be decided at the trial.*

This was an appeal against the decision of the Senior Assistant Registrar given on 28 February 1986 ordering that final judgment be entered against the defendant in the sum of RM200,000 together with interest at 8% per annum from date of filing of the writ to the date of realisation and costs.

The defendant alleged that the plaintiff was not a licensed moneylender under the Moneylenders Ordinance 1951 and that the demand by the plaintiff that the defendant pay an interest of 14% per annum has rendered the said loan agreement illegal and void. The question arises whether the loan was a money-lending transaction. If the plaintiff was a moneylender and not licensed to carry on business of money-lending, then the loan in question was tainted with illegality and therefore unenforceable.

Held:

[1] Summary judgment is only given in plain and obvious cases. The present case is certainly not a plain and obvious case. There are issues which should be decided at the trial.

[2] In the circumstances, the appeal was allowed with costs and the order of the Senior Assistant Registrar was set aside.

[Appeal allowed with costs.]

Cases referred to:
Ngui Mui Khin & Anor. v. Gillespie Bros. & Co. Ltd. [1980] 2 MLJ 9
UMBC v. Palm & Vegetable Oils Sdn. Bhd. & Ors. [1983] 1 MLJ 206

Legislatin referred to:
Moneylenders Ordinance 1951, ss. 2(c), 3

For the defendant/appellant - Mah Weng Kwai; M/s. Mah Weng Kwai & Associates
For the plaintiff/respondent - M. Pathmanathan; M/s. Collin Goonting & Co.

JUDGMENT

Zakaria Yatim J:

This is an appeal against the decision of the Registrar given on 28 February 1986 ordering that final judgment be entered against the defendant in the sum of RM200,000 together with interest at 8% per annum from date of filing of the writ to the date of realisation and costs.

The plaintiff's claim is for a sum of RM200,000 together with interest at the rate of 14% per annum from 1 December 1984 to date of realisation. In his statement of claim, the plaintiff avers that on 1 December 1983, at the request of the defendant he extended a friendly loan to the defendant in the sum of RM200,000. He further avers that by letter dated 1 December 1983, the defendant acknowledged receipt of the said sum together with the terms of repayment. According to the plaintiff, the defendant was to complete repayment of the loan by 1 December 1985. The plaintiff further states that the defendant agreed to pay interest at 14% on the outstanding sum after the first year of the loan. The plaintiff explained that he had to charge an interest at 14% per annum because he had borrowed the sum of RM200,000 from the bank and he had to pay the bank the same interest.

In her statement of defence the defendant aver that she and the plaintiff were legally married from 17 May 1970 until 11 July 1984. On 23 April 1983, they were separated and on 5 September 1983 the High Court in Kuala Lumpur granted an order of decree nisi. The defendant alleges that the interest of 14% per annum charged by the plaintiff is unconscionable and illegal and has rendered the said loan agreement unenforceable. She further alleges that the plaintiff was not a licensed moneylender under the meaning of the Moneylenders Ordinance 1951 and the demand by the plaintiff that the defendant pays an interest of 14% per annum has rendered the said loan agreement illegal and void.

Mr. Mah Weng Kwai submitted that since the interest of 14% was charged, the Court has to determine whether the loan was a money-lending transaction. He referred to s. 3 of the Moneylenders Ordinance and said that under that Section the plaintiff was presumed to be a moneylender. According to him, if the plaintiff was a moneylender, and not licensed to carry on business of money-lending, then the loan in question was tainted with illegality and therefore unenforceable. He submitted that this was a proper case to go for the trial because it involved the determination of both questions of law and facts.

Mr. Pathmanathan on the other hand submitted that the loan was a friendly loan. According to him the letter dated 1 December 1983 was written by the defendant to the plaintiff and that it was the defendant who offered to pay the interest of 14% per annum. He denied that it was the plaintiff who charged the interest. He added that the presumption in s. 3 of the Ordinance did not apply in this case. According to him the plaintiff came within the meaning of s. 2(c) of the Ordinance. Section 2(c) states,

> Any person *bona fide* carrying on the business of banking or insurance or *bona fide* carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money.

Both Counsel cited the Federal Court decision in *Ngui Mui Khin & Anor. v. Gillespie Bros. & Co. Ltd.* [1980] 2 MLJ 9. It is clear from that decision that the Moneylenders Ordinance 1951 does not apply to money-lending but only to moneylenders. It does not make any money-lending transaction illegal and unenforceable. The Court further said that whether a person is a moneylender or not is a question of fact and it is the task of the Court to see whether the principal object of his business as distinguished from incidental part of his business is one of money-lending. The Federal Court also held that there was no triable issue in that case and an application under O. 14 for final judgment be granted. The Federal Court also found that the respondent were a confirming house and their business was such that they could not be said to have carried on the business of moneylenders.

In the instant case, there is no evidence as to the nature of the business of the plaintiff. The letter dated 1 December 1983 was a money-lending transaction. Although it was a letter written by the defendant to the plaintiff, in my opinion the letter was an agreement between the parties. It was not a proposal for a loan as suggested by Mr.Pathmanathan. The terms of the letter had been discussed between the parties and put into writing by a solicitor.

If the plaintiff was to come within the exception of s. 3 of the Ordinance, evidence must be adduced that the plaintiff was a *bona fide* "carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money". The fact that the plaintiff says in the statement of claim that the loan was a friendly loan does not mean that he comes within the exception to s. 3. In the absence of any evidence, the plaintiff, by lending the RM200,000 to the defendant with interest at 14% per annum was presumed to be a moneylender. The onus was upon the plaintiff to rebut the presumption.

Summary judgment is only given in plain and obvious cases. See *UMBC v. Palm & Vegetable Oils Sdn. Bhd. & Ors.* [1983] 1 MLJ 206. The present case is certainly not a plain and obvious case. There are issues which should be decided at the trial.

In the circumstances, I allow the appeal with costs and set aside the order of the Senior Assistant Registrar.

Also found at [1987] 1 CLJ 320